

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JANICE L. HARDY)	
Claimant)	
)	
VS.)	Docket Nos. 1,057,391 and 1,057,392
)	
U.S.D. 500)	
Self-Insured Respondent)	

ORDER

STATEMENT OF THE CASE

Claimant requests review of the January 25, 2012, preliminary hearing Order entered by Administrative Law Judge Steven J. Howard. John G. O'Connor, of Kansas City, Kansas, appeared for claimant. Frederick J. Greenbaum, of Kansas City, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) denied claimant's request for medical treatment. In doing so the ALJ found that "It would appear claimant's date of accident is April 28, 2011, not July 1, 2011."¹

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 24, 2012, preliminary hearing, with exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant filed two workers compensation claims. In both claims she alleged repetitive trauma to the upper extremities. In Docket No. 1,057,391, the date of the accident was alleged to be July 1, 2011. In Docket No. 1,057,392, the claim presently before the Board, the date of accident was alleged to be April 28, 2011. Although the preliminary hearing transcript, the ALJ's preliminary hearing Order, the briefs of the parties, and the application for Board review all refer only to Docket No. 1,057,392, claimant asserts that the preliminary hearing was actually held in Docket No. 1,057,391. The preliminary hearing Order was entered in Docket No. 1,057,392 on January 25, 2012. Claimant filed for Board review in Docket No. 1,057,392 on February 3, 2012. On February

¹ ALJ Order (January 25, 2012).

27, 2012, the ALJ entered an Agreed Order Nunc Pro Tunc in both claims to change the docket number of the preliminary hearing Order “to show that the order should have been issued under companion case, i.e., Docket No. 1057391.” Claimant did not file an amended application for Board review after the Agreed Order Nunc Pro Tunc was filed.

Claimant urges the Board to enter an Order Nunc Pro Tunc to change the docket number on the preliminary hearing transcript and the preliminary hearing Order from 1,057,392 to 1,057,391.² In the alternative, claimant asks the Board to enter an order in 1,057,392 finding that she suffered compensable repetitive trauma injuries under the criteria of K.S.A. 2010 Supp. 44-508(d) with a date of accident of July 1, 2011, the day claimant notified respondent that her condition was work-related and requested medical treatment. Claimant asserts that she fits none of the criteria set out in K.S.A. 2010 Supp. 44-508(d) which would result in the date of accident being April 28, 2011. Nevertheless, claimant maintains that the ALJ erroneously interpreted the provisions of the New Act, which took effect on May 15, 2011, in finding that claimant’s injury occurred on the day her unauthorized physician told her that her condition was probably work-related.

Respondent contends claimant did not meet her burden of proving that her bilateral carpal tunnel syndrome arose out of and in the course of her employment. Respondent argues that claimant failed to establish a date of injury of July 1, 2011. Respondent maintains that claimant did not meet any of the criteria in the New Act for determining the date of injury in repetitive trauma claims. Respondent states in its brief: “Only under Old Act criteria would the date of employer notification mandate a finding of accident on that date if it is the earliest of the statutory criteria. However, the 2010 version of K.S.A. 44-510(d), [sic] which expired on May 15, 2011, does not apply to this case.”³

The issues presented to the Board for review are:

(1) Is this claim governed by the Old Act or the New Act? What is claimant’s date of accident?

(2) Did claimant’s bilateral upper extremity conditions arise out of and in the course of her employment with respondent?

FINDINGS OF FACT & CONCLUSIONS OF LAW

On August 26, 2011, claimant filed applications for hearing in Docket No. 1,057,392 (alleged date of accident April 28, 2011) and Docket No. 1,057,391 (alleged date of accident July 1, 2011). Repetitive trauma injuries were alleged in both claims. Applications

² Claimant’s brief to the Board was filed before the ALJ entered the Agreed Order Nunc Pro Tunc.

³ Respondent Brief (filed March 5, 2010) at 5.

for preliminary hearings were filed in both claims on September 16, 2011. Claimant scheduled both claims for preliminary hearing on January 24, 2012. The notice of preliminary hearing referred to both docket numbers.

The transcript of the January 24, 2012, preliminary hearing makes reference only to Docket No. 1,057,392. At the preliminary hearing, the ALJ announced:

THE COURT: This is the claim of Janice Hardy versus 500 USD, Docket No. 1,057,392. For the record, there is a companion case, 1,057,391, which is not proceeding to hearing today.

This is a new Act, alleged accident being July 1st, 2011.⁴

The issues raised at the preliminary hearing were: (1) whether claimant sustained accidental injury, (2) whether any injury sustained by claimant arose out of and in the course of her employment with respondent, (3) prevailing factor, (4) notice, (5) whether claimant was entitled to authorized medical treatment, and (6) whether claimant was entitled to \$500 unauthorized medical treatment.

The ALJ entered a preliminary hearing Order on January 25, 2012, finding: "Medical treatment denied. It would appear claimant's date of accident is April 28, 2011, not July 1, 2011."⁵ There were no specific findings or conclusions regarding the issues raised by the parties, nor does the Order provide any rationale or explanation as to why the medical treatment requested by claimant was denied.

On February 3, 2012, claimant filed an Application for Review by Workers Compensation Appeals Board in Docket No. 1,057,392. The Application requested Board review of the ALJ's January 25, 2012, Order and raised these issues: (1) whether the ALJ erred in finding the date of accident for claimant's repetitive injuries, and (2) whether the ALJ erred in denying claimant's request for medical care.

On February 27, 2012, the ALJ entered an Agreed Order Nunc Pro Tunc in both docket numbers. The Agreed Order Nunc Pro Tunc was apparently intended to change the January 25, 2012, preliminary hearing Order "to show that the order should have been issued under companion case, i.e., Docket No. 1057391." Briefs were filed with the Board by both parties only in Docket No. 1,057,392.

Under K.S.A. 2010 Supp. 44-551(i)(1) an application for Board review must be filed within ten days. Before any issue raised by the parties may be considered by the Board, a determination must be made whether the Board has jurisdiction to conduct a review.

⁴ P.H. Trans. at 3.

⁵ ALJ Order (January 25, 2012).

In an administrative proceeding, the time for taking an administrative appeal, as described by statute, is jurisdictional, and delay beyond the statutory time is fatal to an appeal.⁶ The right to appeal is statutory.⁷ When the record reveals lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁸ Ordinarily, parties cannot consent, waive, or confer jurisdiction on a court.⁹

Claimant maintains that it was clear to the parties and the ALJ that the preliminary hearing concerned only the alleged accident of July 1, 2011, Docket No. 1,057,391. However, the record is unclear whether the parties and the ALJ intended the preliminary hearing to be held in Docket No. 1,057,392, Docket No. 1,057,391, or both. Despite the record's lack of clarity, it does appear that the hearing was limited by the ALJ to Docket No. 1,057,392;¹⁰ that the preliminary hearing Order was entered only in Docket No. 1,057,392; that the application for Board review was filed only in Docket No. 1,057,392; and that the briefs filed by the parties with the Board make reference only to Docket No. 1,057,392.

With regard to Docket No. 1,057,391, no preliminary hearing was held, no preliminary hearing order was entered, and no application for Board review was filed within the 10-day period required by the Act. No application for Board review was filed regarding the Agreed Order Nunc Pro Tunc.¹¹ Assuming the Agreed Order Nunc Pro Tunc had the intended effect of changing the preliminary hearing transcript and the preliminary hearing Order from Docket No. 1,057,392 to Docket No. 1,057,391, the entry of that Order cannot confer jurisdiction on the Board which is otherwise lacking.

The undersigned Board Member finds that the Board does not have jurisdiction to review any decision which may have been entered in Docket No. 1,057,391 because no timely application for Board review was filed in that claim.

⁶ *State v. Bank Commissioner v. Emery*, 19 Kan. App. 2d 1063, Syl. ¶ 1, 880 P.2d 783 (1994).

⁷ See *Resolution Trust Corp. v. Bopp*, 251 Kan. 539, 541, 836 P.2d 1142 (1992).

⁸ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

⁹ See *In re Marriage of Harris*, 20 Kan. App. 2d 50, 58, 883 P.2d 785, rev. denied 256 Kan. 995 (1994).

¹⁰ The ALJ stated at the preliminary hearing that "[t]his is a new Act, alleged accident being July 1st, 2011." P.H. Trans. at 3. Those comments by the ALJ tend to support claimant's position; however, in context with the entire record, it remains unclear which claim or claims the preliminary hearing was intended to encompass.

¹¹ It is noted that typically nunc pro tunc orders are only appropriate to correct clerical errors in the entry of a decision. *Bennett v. K-Mart Corp.*, Nos. 187,608, 187,609, 2006 WL 328194 (Kan. WCAB Jan 25, 2006). The Agreed Order Nunc Pro Tunc in this claim very likely did not merely correct a clerical error.

An application for Board review was timely filed in Docket No. 1,057,392; however, the Board cannot review the preliminary hearing Order in that claim because the Order itself is insufficiently detailed to allow the Board to determine the specific findings and conclusions which formed the basis for the ALJ's denial of compensation. In the absence of such specific findings and conclusions, the Board is unable to tell whether it has jurisdiction in Docket No. 1,057,392.

The Kansas Workers Compensation Board has jurisdiction to review decisions of administrative law judges only to the extent provided in the Act. The Board has limited jurisdiction to review preliminary hearing orders. That jurisdiction is limited to disputed issues of compensability as specifically set forth in K.S.A. 44-534a(a)(2).¹² The Board also has jurisdiction to review preliminary hearing orders under K.S.A. 2010 Supp. 44-551(i)(2)(A) if it is alleged that the ALJ exceeded his or her jurisdiction in granting or denying the relief requested at the preliminary hearing.

Claimant does not allege that the ALJ exceeded his authority under K.S.A. 44-534a. The preliminary hearing Order does not indicate the specific basis (or bases) for the denial of claimant's request for medical treatment. There were a number of issues raised by the parties at the preliminary hearing and some of those issues directly dealt with the compensability of claimant's alleged series of repetitive trauma injuries. Given the judge's comment that it would appear that claimant's date of accident was April 28, 2011, not July 1, 2011, it might be inferred that the denial of claimant's request for preliminary relief was based on lack of timely notice. But, the Order may have been based on whether or not claimant successfully satisfied her burden to prove personal injury by accident or repetitive trauma arising out of and in the course of her employment with respondent. Or preliminary relief may have been denied for lack of proof regarding the prevailing factor requirement under the New Act. However, the denial could have been based on a failure of proof that claimant required medical treatment, which is not a finding the Board has jurisdiction to review at this point in the claim.

The Board cannot speculate as to whether it has jurisdiction. Accordingly, Docket No. 1,057,392 must be remanded to the ALJ for further proceedings and orders consistent with this Order and for specific findings and conclusions on the issues raised by the parties.

The parties are reminded that by statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹³ Moreover, this preliminary hearing Order has been determined by only one Board

¹² *Carpenter v National Filter Service*, 26 Kan. App. 2d 672, 674-76, 994 P.2d 641 (1999).

¹³ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹⁴

ORDER

WHEREFORE, it is the finding, decision and Order of this Board Member that the Board has no jurisdiction in Docket No. 1,057,391, and that Docket No. 1,057,392 is hereby remanded to the ALJ for further proceedings and orders consistent with this Order and for specific findings and conclusions regarding the issues raised by the parties.

IT IS SO ORDERED.

Dated this _____ day of April, 2012.

HONORABLE GARY R. TERRILL
BOARD MEMBER

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Steven J. Howard, Administrative Law Judge

¹⁴ K.S.A. 2010 Supp. 44-555c(k).